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IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No 938 of 1995

with

CRIMINAL APPEAL No 1011 of 1995

For Approval and Signature:

HON'BLE MR.JUSTICE B.J.SHETHNA
and
HON'BLE MR.JUSTICE J.R.VORA

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the concerned Magistrate/Magistrates,Judge/Judges,Tribunal/Tribunals? : NO

MAHENDRA @ PUNAMBHAI BHOI

Versus

STATE OF GUJARAT

Appearance:

1. Criminal Appeal No. 938 of 1995
MR KB ANANDJIWALA for Appellant
MR HM PRACHHAK, APP for Respondent

2. Criminal Appeal No. 1011 of 1995
MR YATIN SONI for Appellants
MR HM PRACHHAK, APP for Respondent

CORAM : HON'BLE MR.JUSTICE B.J.SHETHNA
and
HON'BLE MR.JUSTICE J.R.VORA

Date of decision: 17/01/2004

COMMON C.A.V. JUDGEMENT
(Per: HON'BLE MR.JUSTICE J.R.VORA)

1. Both the appellants of these appeals were original accused of Session Case No.36/93 have preferred these appeals against the judgment and order delivered by Sessions Judge, Kheda at Nadiad on 11.9.1995, convicting accused No.1 Dinesh Chhaganbhai Bhoi for the charges proved against him under Section 302 of the IPC and sentencing him to life imprisonment. He has preferred Criminal Appeal No. 1011 of 1995, and convicting accused No.2 Bhailal Chhaganbhai Bhoi for the charges proved against him under Section 302 read with Section 34 of the Indian Penal Code. He has also preferred Criminal Appeal No. 1011 of 1995 along with appellant Dinesh Chhaganlal as appellant No.2 of the said Appeal. By the very judgment and order, learned Sessions Judge, Kheda at Nadiad, also convicted the accused No.3 Mahendra Bhupendra Punambhai, who has preferred Criminal Appeal No. 938 of 1995, and he is also sentenced to life imprisonment for the charges proved against him under Section 302 read with Section 34 of the IPC. For the charges under Section 135 of the Bombay Police Act, all the three accused were acquitted and though the charges against accused No.3 Mahendra @ Bhupendra Punambhai under Section 323 of IPC was proved, no separate sentence is awarded.

2. The facts leading to filing of prosecution against the present appellants in both the appeals are as under :

The First Information Report, as per the prosecution case, was filed by one Kiranbhai Jayantilal, PW-1 on 6.10.1992 at about 2.00 hours. In all the FIR was filed against four accused. Out of this 4 accused, original accused No.2 Ramesh Chhaganlal Bhoi expired during trial and, therefore, appeal came to be abated against him. Accused Ramesh Chhaganlal Bhoi, Dinesh Chhaganbhai Bhoi and Bhailal Chhaganbhai Bhoi are real brothers, while accused No.4 Mahendra @ Bhupendra Punambhai is cousin brother of rest of the three accused. According to prosecution case, on 6.10.1992, at about 1.15 hours the incident occurred. PW-1 Kiran Jayantilal was residing near Darjiwad falia and they were in all 7

brothers and doing the business of electrical goods in the name of Gayatri Electricals. Deceased in the incident Rajendra was their brother. At the time of incident, deceased was serving at Bharuch in State Transport Depot. On the late night of 15.10.1992, there was a hawan of Goddess Verai Mata at Umreth. Deceased Rajendra visited Umreth with his family from Bharuch to attend the said Hawan of Goddess Verai Mata at Umreth. All the accused at the relevant time were staying near the residence of complainant. Before one and half month of the incident, the owner of the house, in which the accused were staying, had sold the said house to one T.A. Mani. The accused had suspicion and doubt in their mind that complainant and his brothers played part in the said transaction. At the time of the incident, complainant and his brother Ghanshyam PW-8 were sitting in their house and they heard commotion out side on the road. On hearing shouts, complainant Kiranbhai and PW-8 Ghanshyam Jayantilal came out of their residence and noticed that their brother Rajendra was returning from temple after having darshan of Hawan. They also noticed that accused No.1 Dinesh Chhaganbhai Bhoi was present with a sword in his hand, accused Ramesh (since died) was present with sword in his hand and other two accused Bhailal Chhaganbhai and Mahendra @ Bhupenra Punambhai present at the spot were abusing deceased Rajendra. Complainant attempted to persuade the accused not to utter abuses but all the accused excited and told that kill them today and accused No.1 Dineshbhai inflicted a blow of sword by pushing sword in the chest of deceased Rajendra causing piercing wound. Accused Ramesh (since deceased) also attempted a blow of sword on complainant but the same was parried by the complainant and the blow landed on a finger of left hand of the complainant. Accused No.4 Mahendra @ Bhupendra Punambhai is named in the FIR as cousin brother of the other accused and it is alleged that he inflicted a stick blow on the cheek of the complainant. At the time, Bhanubhai Patel came to the spot and the accused ran away from the scene of offence. The wound inflicted in the chest of deceased Rajendra was profusely bleeding and, therefore, the complainant called an autorickshaw from nearby of one Rameshbhai Darji. In the said rickshaw deceased was taken to Municipal Hospital of Umreth, but there, they found that the duty Medical Officer was not present. On returning from the hospital, deceased Rajendra died in the rickshaw and therefore the rickshaw was taken to Umreth Police Station where a complaint was lodged by complainant Kiranbhai before Police Sub-Inspector Jensinh Atusinh Thakor, who recorded the complaint Exh.57. The incident occurred on late hours of night of 5th of October, 1992 and on very

early hours of 6th of October, 1992. The investigation thereafter was entrusted to PW-12 Jensinh Atusinh Thaker, PSI of Umreth Police Station, and after investigation was over, a charge sheet came to be filed for the offences punishable under Sections, 302, 323, 324, 504, 506 (2) read with Section 34 of the IPC and Section 135 of the Bombay Police Act against all the 4 accused in the court of learned Judicial Magistrate, First Class, at Umreth, who in turn vide order dated 21.1.1993 under Section 209 of the Criminal Procedure Code committed the case to the Court of Sessions which was registered as Session Case No. 36 of 1993 in the Court of Sessions Judge, Kheda at Nadiad.

3. On 27.7.94 charge for the offence punishable under Sections 504, 114, 506(2) 302, 34, 323, 324 of IPC was framed by learned Sessions Judge vide Exh. 4 against three accused i.e. present appellants only, because on 15.6.1994 original accused No.2 Rameshbhai Chhaganbhai Bhoi had died and vide order below Exh.2, the trial came to be abated against the accused Rameshbhai Chhaganbhai Bhoi.

4. The accused pleaded not guilty and, therefore, the prosecution examined as many as 13 witnesses to prove its case and also produced documentary evidence.

5. Learned Counsel Mr. Anandjiwala in Criminal Appeal No. 938 of 1995 on behalf of original accused No.3 and learned counsel Mr. Yatin Soni on behalf of appellants of Criminal Appeal No.1011 of 1995 filed by original accused No. 1 and 2 and learned APP Mr. H.M. Prachhak were heard in detail and at length. They also submitted their written submissions in detail. Therefore, before we deal with the contentions raised by both the sides, it is absolutely necessary to refer to the evidence of prosecution in detail and then to appreciate the same with reference to the contentions raised by both the sides.

6. PW-1 Kiranbhai Jayantilal is examined at Exh. 18. According to him, the incident occurred in early hours of 6th of October 1992. All the three accused were identified by him. The name of the mother of the accused was Dahiben and they were staying near the house of the complainant. According to PW-1 about one and half years before the present incident, the owner of the said house, in which the accused were staying, sold the said house to Mr. T.A. Mani and, therefore the accused had grievance against the PW-1 complainant and his brothers that they played part in the said transaction. PW-1 further stated

that on account of this, the accused took frequent quarrels with them. PW-1 further deposed that at about 1.15 hours on 6.10.1992, he heard shouts and commotion out on the road while he was sitting in his house with his brother Ghanshyam and, therefore, both of them came out of their house and on the road they found that accused No.1 Dineshbhai and accused No.2 Rameshbhai (since deceased) had sword, accused Bhailalbhai had stick and cousin brother of the above said accused i.e. Mahendra had also stick in his hands and all the four accused were abusing deceased Rajendra. At that very juncture, his brother Ghanshyam and one Bhanubhai came to the scene of offence and all of them persuaded all the accused not to utter abuses. Accused Bhailal Chhaganbhai instigated other accused that complainant and his brother should be killed and, therefore, Dineshbhai - accused No.1 gave a blow with a sword on left side of the chest of Rajendra and deceased accused Rameshbhai also gave a blow of sword on the complainant which was parried by him but landed on the finger of left hand of PW-1. Accused No.4 according to PW-1 inflicted a blow of stick of his left cheek. The injury inflicted on Rajendra, according to PW-1, was serious and Rajendra was profusely bleeding and, therefore, he immediately called an autorickshaw from nearby which belonged to one Ramesh Darji. Thereafter, Ghanshyam PW-8 and Bhanubhai took Rajendra in Rickshaw at Government Hospital, but since the Doctor was not found in the hospital, they returned in the same rickshaw and while returning Rajendra died on way. Therefore, in the same rickshaw they turned towards Umreth Police Station and he offered the complaint in Umreth Police Station which was recorded and registered. In deposition - First Information Report, Mark 16/1 was shown to him, which he identified to be signed by him and he identified his signatures on the complaint. The complaint is on record at Exh. 57. In para-5 of his deposition PW-1 identified sword being mudammal article No. 9 which was in the hand of original accused No.1 Dineshbhai Chhaganbhai and the sword Article No.14 which was in the hand of deceased accused Ramesh Chhaganbhai. PW-1 also described swords in his deposition in detail. Sticks of the mudammal articles No.10 and 13 were also shown to this witness which was identified by him to be the sticks in the hands of accused No.3 Bhailalbhai and accused No.4 Mahendrabhai. In the said incident, PW-1 was also injured and, therefore, he was sent to Referral Hospital at Dakor where he received treatment of his injury. According to PW-1 the incident took place outside the dela (main door of the house) on road. According to PW-1 at the time of incident except him, PW-8 Ghanshyam, Bhanubhai and the four accused, nobody

was present. He also stated that he witnessed the incident in the brightness of tube-light which was on pole nearby the place of the incident as public stree-light. He identified the clothes of deceased Rajendra, rings and watch worn by the deceased at the time of the incident. He also stated that before this incident, on 12.3.1990, between him and the accused a quarrel took place, in which he was beaten by the accused, for which he filed a complaint before Umreth Police Station and thereafter also on 12.2.1991 he was beaten by accused Dineshbhai, causing fracture on right leg and that incident was also recorded at Umreth Police Station and at that juncture when his deposition was recorded, according to PW-1 those cases were pending in the court at Umreth. According to this witness, after recording of the complaint, the dead body of deceased Rajendra was taken to the Police Station and inquest panchnama was drawn and thereafter dead body was sent to Dakor Hospital for postmortem. He has been cross-examined by the defence through separate lawyers i.e. for accused No.1 by one lawyer, and accused Nos.2 and 3 by other lawyer. In his cross-examination, he stated that his house is situated 1 km away from the temple of Goddess Verai Mata. Hawan started at midnight, which continued upto 7'O clock in the morning. At the place of Hawan, many persons remained present. Umreth Government Hospital was situated about 800 to 900 feet from his residence and in rickshaw it took about couple of minutes to reach to the hospital. The Police Station is situated at the distance of 2000 feet from hospital and in rickshaw it might take 5 minutes, according to PW-1, to reach Police Station from hospital. He denied that in local situation of scene of offence there was one outlet, in between, Pramod Soap Factory is situated near his house. He has been cross examined in detail about situation around the house belong to one Mr. T.A.Mani which is situated near the scene of offence. He admitted that PW-8 Ghanshyam was staying at Darjiwad at the relevant time. He also admitted that in his police statement he omitted to state that while he and PW-8 Ghanshyam were staying in the house and they heard shouts from outside. A contradiction is also sought to be made that PW-1 stated in complaint that the sword was thrashed in the chest of deceased Rajendra by accused No.1 Dineshbhai Chhaganbhai while in deposition PW-1 stated that such injury was caused on left side of the chest. He denied that there was darkness and there was no light. The incident took about four minutes. PW-8 Ghanshyam and Bhanubhai took up the deceased Rajendra and placed him in the rickshaw, but this fact according to PW-1 had not stated in the complaint. In cross-examination he further

stated that at about 2.00 hours on the day of incident he reached to the Police Station. Thereafter, his complaint was recorded. It was alleged that he was maintaining good relationship with the police especially Investigating Officer PSI Thakor, but this allegation was denied by him. The fact that during inquest panchnama one key was not found from the clothes of the deceased which was found by the Doctor who performed postmortem is elaborately asked to this witness. Suggestions were also placed that the quarrel was picked up by the complainant's side and PW-1 pelted stones and the accused were beaten by sticks by the complainant's side. It was also denied that deceased accused Rameshbhai Chhaganbhai was attacked by the complainant side and had received injuries on elbow and cheek. He also received injury on the head. This fact was denied by PW-1. It was also asked in the cross-examination that the complainant side with sticks and iron pipes attacked the house of deceased - accused Rameshbhai Chhaganbhai but since the doors of the house of deceased - accused Rameshbhai Chhaganbhai could not be broken, deceased Rajendra went to the roof of their house and jumped on the roof of the house of the deceased accused and deceased Rajendra was noticed by Dahiben, Rajendra was confused and fell down in godown of Mr. T.A. Mani and some sharp iron objects was thrashed in the chest of the deceased Rajendra. PW-1 denied all these suggestions. It was asked about the discovery made by the Investigating Officer of the swords from the house of the accused in detail. His cross-examination runs into pages and attempt was also made that Sharmishthaben, wife of deceased Rajendra was accompanying him. Perhaps, these questions are asked because Sharmishthaben has not been examined by the prosecution in the trial and attempt has also been made in cross-examination that it was not possible for witness No.1 to identify the sword as has been described by him in the deposition to establish that the part of the swords from which the swords were taken in hand by the accused, but he denied the suggestions made to him by the defence.

7. PW-2 Baldevbhai Karsanbhai Prajapati is examined at Exh.21 by the prosecution, who was Deputy Mamlatdar at the time of the incident and from the scene of offence, he prepared the map of scene of offence, which is placed on record at Exh. 22. This witness has been examined by the prosecution only for this limited purpose.

8. PW-3 Exh. 24 Somabhai Mohanbhai is examined by the prosecution for the panch of panchnama Exh. 25 by which clothes of the deceased including a watch, two rings, jenoi etc. were seized by the Police. According

to him, he was called by the Police on 6.10.1992 at about 12.30 hours at Police Station Umreth, and these clothes and other things were there in the Police Station, for which a panchnama was drawn and along with other panch he signed the panchnama.

9. PW-4 Atul Govindlal Shah is examined by the prosecution at Exh. 26 as a panch witness of panchnama Exh.27 being inquest panchnama. The witness has supported the inquest panchnama and has described the position of dead body according to panchnama. He has been cross-examined by the defence side. Allegations were levelled that he was all alone while the panchnama was drawn and the second panch was not present. It was also alleged that the complainant happened to be his friend and to oblige him he had signed the panchnama.

10. PW-5 Dr. Uday Sureshchandra Shah, is examined at Exh. 28 by the prosecution. According to him, on 6.10.1992, he was stationed as Medical Officer at Dakor Hospital, and on that day in the morning at 9.30 with a police yadi and inquest panchnama and other papers, dead body of the deceased Rajendra was brought to him. He started postmortem examination at 10'O clock in the morning and completed at 11.00'O clock. He described dead body in postmortem notes and his deposition he described the clothes which were on in the dead body. It was also stated that he found one key from the pocket of the pant which was on the dead body. On the shirt and pant there were stains of bloods and there were stains of bloods on the chest of the dead body. Generalized riggers mortis present all over body. On the back side of the body, PM liquidity was not found. He noticed the following external injuries.

(1) Incised wound - sharp margin, no action & bleeding wound Inp++ slight oblique in fashion situated over lower 1/3 of sternum of about 2 1/2" x 1"* deep to sternum 4" on examination of wound following structure cut through (1) skin, subcutaneous tissue sternum lower 1/3 piece its 5th & 6th rib costal cartilage. (2) 5 mmt. lacerated wound superficial oblique over (LT) foot or based 2nd and 3rd great toe (3) 5mmt. lacerated with full thickness skin over (RT) great toe finger aspect. (4) Abrasion over (LT) shoulder jt. upper posterior aspect 2 x 1 c.m. superficial.

As in column 17 injury No.1 (1) punctured incised wound cut high. However 1/3 of sternum of 5th &

6th ribs costal cartilage.
Anti Mortem.

From internal examination he found 1/3 of sternum, 5th & 6th rib costal cartilage. Both lungs collapsed and about 500 cc blood in Thoracic cavity. Pericardium torn due to punctured incised wound upto (RT) ventricle cavity. Puncture wound in (RT) ventricle of about 1.5 x 1 x 2 cm extending into (RT) ventricle cavity. Heart empty. Pericardium contain about 300 cc of blood.

The stomach contain some solid food material with watery containing in it.

According to the Doctor, the cause of death was instantaneous death due to shock & haemorrhage as a result of puncture penetrating incised wound of chest leads to injury to heart & cardia respiratory failure. According to Doctor, these injures were sufficient in ordinary course of nature to cause death and all the internal injuries were corresponding to external injury No.1. The injury was possible by sharp edged weapon and by the sword of muddamal article No.9. He has been asked about the possibility of causing injury Nos. 2 and 3 which were simple in the nature. PW-5 Dr. Uday Sureshchandra Shah also examined complainant Kiranbhai Jayantilal at about 11.00'O clock and he offered the history that at about 1'O clock he received injury by sword. He examined Kiranbhai on 6.10.92 and according to PW-5 Kiranbhai had following injuries:

(1) Description of injuries (size, site, shape, nature of injuries etc.)
O/I incised wound of 1 x 2 x 1/2 cm over hip of (Lt) middle finger 1 x 1/2 cm aspect.

Abrasion superficial of 6 x 1 cm vertically over (RP) from exterior medlar aspect over middle 1/3 of (Rt) arm.

In the opinion of PW-5, injuries inflicted to complainant Kiranbhai was possible by sharp blunt weapon and by sword of muddamal Article No. 14. According to him, while inflicting the injury by a wielded sword if the victim raises his hands then injuries which complainant received was possible. Dr.Uday Sureschandra Shah was extensively cross-examined by the defence side. He has been alleged that he had not performed any

postmortem of the dead body in question, but he denied the allegation. He has been asked about the identification of the dead body, which was not done by the Police Constable, who brought the dead body, but he has replied that when inquest panchnama was provided with the dead body, the question of identification of the dead body by the Doctor would not arise. He has been asked that in inquest panchnama the key which was found by him was not referred, whether he asked anything to the Police Constable in this respect. The witness denied to have asked anything to the Police Constable. He has been asked that the edges of muddamal articles sword 9 and 14 were not sharp on both the sides and the swords were sharp edged from one side and while they were not sharp but blunt on the other side. Therefore, it was asked that the injury which deceased Rajendrabhai received could not have been received by him by the sword of muddamal article 9. PW-5 admitted that when injuries caused by the weapon like muddamal article No.9 sword, ordinarily, the injury would be sharp at one end while the injury would be irregular in shape on the other end, but he explained that it was not necessary that all the time in such circumstances injury caused would be sharp at one end and would be irregular at the other end. He was asked about the measurement of the injury caused to deceased Rajendra and was in this regard further asked that the said injury could not be possible by the sword of muddamal article No.9, but PW-5 denied this suggestion. He also stated in the cross-examination that he prepared the rough sketch of the injury caused to the deceased and he had shown that figure by drawing the same in the postmortem notes. According to him, since there was some semi digested food found in the stomach of the deceased, he might have taken food before about 4 hours from the death. According to him in view of the rigger mortis position on the dead body the death might have been caused during previous 8 to 12 hours from the time of the postmortem. He also in the cross-examination stated that the rigger mortis on the dead body was on the second stage and, therefore, death could have been caused during previous 20 to 24 hours of the postmortem. He denied that it was not possible to say for him about the weapon by which the injury was caused on account of omission to note angles of the injury, and last of his cross-examination which took place on 18.3.1995 by the defence side. He has been then extensively cross-examined about the volatile act of the deceased after the injury, and it was suggested that after the injury in volatile act, the deceased tried to run 20 to 25 steps, but this witness denied the suggestion and stated that the deceased might have died on the spot and

he was unable to run 20 to 25 steps. Then again a point was attempted to be made in the cross-examination that lungs were collapsed but the heart was functioning after the injury, which was possible for the deceased to perform volatile act. But this suggestion is also denied by this witness having regard to the fact of the case. He produced postmortem note and injury certificate of the deceased and injury certificate in respect of PW-1 Kiranbhai Jayantilal.

11. At Exh. 32 PW-6 Nitin Surendraprasad is examined as a panch witness to be the panch of panchnama of Exh. 33 which is arrest panchnama of deceased Ramesh Chhaganbhai. Exh.33 panchnama was proved through this witness and he supported the panchnama. He stated that on 6.10.1992 along with other panch, he was called to the Police Station where deceased - accused Rameshbhai was present and he had a bandage on his head. Deceased accused Rameshbhai offered his name and his arrest panchnama was prepared. There was allegation that he was a tutored witness but this allegation was denied by this witness.

12. At Exh. 35 PW-7 Rajesh Madhusudan is examined to be the panch of panchnama at Exh. 36 in respect of arrest of accused No.1 Dineshbhai Chhaganbhai, but according to this witness he was called by the police at Umreth Police Station at 7.30 hours on 7.10.92. He supported the panchnama at Exh. 36 and stated to have signed the said panchnama and also stated that Dineshbhai accused No.1 was present at the Police Station. He had injury on his right hand of last finger where bandage was tied. He had also injury on the hand. Exhibit 36 panchnama is also in respect of arrest panchnama of accused Bhailalbhai and this witness supported his arrest. PW-7 is also one of the panchas of Exh.37 panchnama which is discovery panchnama of the two muddamal articles No. 9 and 14. According to him, on the same day on 7.10.92 at about 10'O clock in the morning he was called by the Police at the Police Station where deceased accused Rameshbhai Chhaganbhai was present. A preliminary panchnama was prepared at the Police Station and thereafter deceased accused Rameshbhai Chhaganbhai took them to the house of the deceased accused Rameshbhai Chhaganbhai. Rameshbhai offered that he kept the sword at upper floor of the house where the sticks were kept for fire for cooking. Sword was concealed by him and in the presence of panchas he took out the sword from the sticks which was concealed. Thereafter this witness identified the said sword to be muddamal article No.14 sword. He has been extensively

cross-examined and alleged that he had signed on the blank paper but this allegation was denied by the prosecution though he admitted that when next time he was called by the police for panchnama, he was told that a sword to be seized and there he was required to attend the panchnama. He admitted that the sword was rusted and edges of the sword were blunt.

13. PW-8 Exh. 38 Ghanshyam Jayantilal is examined by the prosecution witness being the second eye witness of the incident. According to him he was serving in the State Road Transport Divisional Workshop as Welder at Nadiad Town. He resided at village Umreth along with him his mother and his brothers Mahendrabhai, Navinbhai, Kiranbhai, Rameshbhai, Dilipbhai were staying with him. Deceased Rajendra was serving at Bharuch in the State Road Transport Depot as Fitter. Rajendra was also called by name Maheshbhai. Nearby, the accused along with their mother Dahiben were also residing. The said house in which the accused were staying owned by one Brahmin of Umreth which was sold to one Mr. T.A. Mani. The accused had suspicion that the said transaction was facilitated by complainant's side and therefore there were some quarrels between them on this account. On 15.10.1992, there was Hawan of Verai Mata and therefore deceased Rajendra along with his family had visited Umreth. On 6.10.1992 at 1.15 p.m. at night, he was in his house and chatting with PW-1 Kiranbhai. They heard commotion and shouts outside the house and therefore they went to the main door of the house, when they noticed that on road all the four accused were present. Out of them, deceased Rameshbhai and accused No.1 Dineshbhai had swords in their hands, accused Bahilalbhai had sticks in his hand. Rajendrabhai was returning from Hawan. On hearing shouts, Bhanubhai Patel also came to the spot. All the accused were abusing deceased Rajendra and PW-1 Kiranbhai. Deceased Rajendra scolded accused and asked them not to utter abuses. At that juncture, accused Bhailalbhai instigated all the accused and said that kill them and therefore accused No.1 Dineshbhai Chhaganbhai Bhoi excited and thrashed a sword on left side chest of the deceased. Deceased - accused Rameshbhai also wielded a sword blow on PW-1 Kiranbhai but Kiranbhai raised his hands and, therefore, the blow hit on middle finger of the left hand of PW-1 Kiranbhai. PW-1 also received injuries on the right elbow of hand. Again Bhailalbhai instigated the accused. Accused Mahendra @ Bhupendra Punambhai inflicted a stick blow on left cheek on PW-1 Kiranbhai. Thereafter, accused ran away. The wound caused to deceased Rajendrabhai was profusely bleeding and he was fallen down on the road. PW-1 called

immediately an autorickshaw, he, PW-1, and Ghanshyambhai lifted Rajendrabhai and took him to hospital in the rickshaw where on inquiry it was found that the Doctor was not present. While they were returning, deceased Rajendrabhai died on way, the same rickshaw was thereafter taken to the Police Station where police recorded the complaint of PW-1. He identified the accused and swords and sticks of muddamal articles. He also identified the clothes of the deceased. The witness has been exclusively cross-examined. He denied the allegation that he also had been to darshan of Hawan. He denied the allegation that he had good relationship with the Investigating Officer Thakor. He was confronted with the police statement and he denied that in his police statement he omitted to state that the accused No.3 Bhailal was instigating the accused. He has been asked that the accused were not staying in a house situated nearby their house. He has also been cross-examined about the local situation of the scene of offence. He denied that from the scene of offence he straightaway went to the Police Station in rickshaw. He was asked about how deceased was lifted from the scene of offence and placed in rickshaw. He denied that on account of lifting deceased Rajendrabhai, his clothes were also stained by blood. He denied that in fact deceased Rajendrabhai died 4/5 hours earlier than it is stated to have died. He admitted that when they reached to the Police Station, Rameshbhai was present. He could not say that how was he present at the Police Station at that time. He went to their house to inform his family and he did not stay at the Police Station any longer. He came to know Bhanubhai only after the incident. He denied that Bhanubhai Patel was his best friend. He admitted that previous to the incident there was no quarrel took place between deceased Rajendrabhai and the accused. He was again confronted with the contradictions in his police statement and he denied that he did not offer before the police that deceased Rajendrabhai persuaded the accused not to utter abuses. He denied the suggestion that the deceased died somewhere else than the scene of offence at about 10'O clock that night. He denied that the persons residing nearby were gathered. He admitted that at the time of the incident nobody attempted to rescue Rajendrabhai because the accused were having swords in their hands. About the transaction taken place between T.A. Mani and the owner of the house of the accused, detailed questions were asked by the defence. He was also suggested that due to Navratri festivals, there was loud noise through loud speakers and it was not possible for the witness to hear shouts from the outside but the witness denied the suggestion. In

para 35 of the cross-examination, the witness was asked about the situation at the time of the scene of offence and how and at what distance the sword was wielded by the accused. His cross-examination also runs into pages.

14. Prosecution examined Champaklal Ambalal at Exh.39 as PW-9 to be panch of panchnama Exh.41 by which as per the prosecution case Investigating Officer searched the house of the accused and recovered sword i.e. mudammal article No.9. Witness Champaklal Ambalal in all respects supported the prosecution case and stated that he was called as panch on 6.10.1992 at 3.30 near the house of one Vimlaben at Darjiwad falia. This house belonged to the accused was searched in presence of the other panch and PSI. After passing necessary resolution, they entered in the house of Vimlaben and house was searched. Description of the house is given by this witness in the deposition. On the first floor there was a cellar and in between the wall and TA Mani shop, one sword was found which was seized by the police. In cross-examination, he was asked that when they entered in the house of Vimlaben, the house was closed and Vimlaben said that she was all alone in the house and they ought not to have entered in her house. He was also asked that PSI pushed Vimlaben due to which Vimlaben had fallen down. This allegation was denied by the witness. He was asked about the situation of the house of Vimlaben which witness replied properly. He was asked that the legs of Vimlaben were paralytic and she could not walk properly and this fact was admitted by the witness. It was alleged that in the defence no such sword was ever seized in their presence, which was denied by the witness.

15. Vide Exh. 42, PW-10 Pramodbhai Veljibhai is examined who was panch of panchnama of scene of offence Exh.43. According to him, he was called on 6.10.1992 by the police. PW8 - Ghanshyam Jayantilal was present and in his presence Ghanshyam shown the place of offence where they found blood in the circumference of 1 1/2 feet on tar road and thereafter the boundaries and description has been stated by the witness of the scene of offence. In cross-examination, it was alleged that on the day of the incident, he was not working in the factory as stated by him. He denied the suggestion and also a suggestion that no panchnama was ever prepared in his presence and no sample of earth or blood was seized from the scene of offence.

16. Prosecution also examined PW-11 Firozkhan Rasulkhan, Exh. 49 being the panch witness of panchnama of Exh. 50 by which accused No.4 Mahendra @ Bhupendra

Punambhai was arrested by the police and he offered the sticks before the police in the presence of this panch. According to this panch witness, on 6.10.1992, he was called by the police at about3.30 p.m. and second panch was Pinakinbhai Natwarlal Kansara, one boy, was present in the police station and on inquiry he offered his name to be Mahendra Bhupendra Punambhai, resident of Umreth and he presented before the police a stick which did not contain any blood stains. He has been alleged that he had never been to the Police Station as panch and police obtained signature on a blank paper, but he denied the allegation. An attempt has been made by the defence in the cross-examination to show the close relationship between him and the police which was denied by this witness.

17. PW-12 Jensinh Atusinh Thakor has been examined at Exh. 56 being Investigating Officer and the then PSI of Umreth Police Station. According to him, during night of 5th October and 6th October, 1992 he was in bandobust of Verai Mata Hawan and he found that some quarrel had taken place near Darjiwadi Naka and injured was taken to Police Station. Therefore, he went to the Police Station where Kiranbhai was present. He recorded his complaint, took over the investigation, drawn panchnama and recorded the statement of the witnesses. He has been extensively cross-examined. Contradictions are proved. He has been alleged to be a biased Investigating Officer but he denied the above said suggestion.

18. Over and above the oral evidence, the prosecution tendered the following documentary evidence.

First Information Report at Exh. 57, Map of scene of offence at Exh.22, panchnama of seizure of clothes of dead body at Exh.25, inquest panchnama at Exh. 27, postmortem note at Exh. 29, injury certificate of PW-1 at Exh.30, arrest panchnama of accused deceased Rameshbhai at Exh.32, other panchnamas of arrest of the accused at Exh. 36 and Exh. 37, panchnama by which search was conducted by Investigation Officer at the house of the accused at Exh. 43, panchnama of scene of offence, by which the accused No.4 presented the stick before the police at Exh.50, the Forensic Science Laboratory report and yadis are produced at Exh. 51,52, 60 and 61, a notification issued under Section 135 of the Bombay Police Act is produced at Exh.68.

19. Thereafter, the statements of the accused were recorded by the learned. trial judge under Section. 313 of Criminal Procedure Code, wherein the defence of each

of the accused was of total denial with the further clarification that the complainant party was in habit of lodging frivolous and false complaint against them. IN all the cases, the accused were acquitted and the copies of the judgments were produced on record. However, the defence examined Vimlaben Chhaganbhai at ex. 74 as a defence witness and she stated that in night between 5th and 6th of October, 1992 when she was all alone in her house, police knocked the door of her house and on opening she found that PSI Mr. Thakore, Kiranbhai, Ghanshyam and Ramesh were standing on doorstep and sword was in hand of Kiranbhai. PSI Mr. Thakore pushed her, due to which, she had fallen down. There is no light on the first floor of her house and, thereafter, since she was all alone, all of them get out of the house. She happens to be a sister of accused Dineshbhai.

20. Learned Advocate Mr. Soni for the appellants Dineshbhai and Bhailalbhai of Criminal Appeal No. 1011/95 contended that firstly, having regard to to the contradiction in the deposition of complainant, appellant no. 2 - Bhailalbhai though had stick in his hand had not used the same and had not caused any injury to any person and that according to the deposition of the complainant in contradiction to his complaint, appellant- Bhailalbhai had instigated after the completion of main incident. The allegation of instigation by the accused Bhailalbhai therefore becomes doubtful and, there was no required intention on the part of the accused Bhailalbhai. The main stress which learned Advocate Mr. Soni placed was on conflict between the medical evidence as well as ocular evidence. Complainant Kiranbhai, according to the learned Advocate Mr. Soni, stated that he received injury on his cheeks from a stick blow by accused appellant Mahendra @ Bhupendra Punambhai Bhoi, but in this regard, according to the learned Advocate Mr. Soni, there is no medical evidence. Heavy reliance is placed in this behalf on a decision of Supreme Court in the matter of LAXMISINH AND ORS. vs. STATE OF BIHAR, as reported in AIR 1976 SC 2263. It is further stated that witness Ghanshyambhai Exh.38 in his deposition stated that Bhupendra gave blow with force and if that be true, the direct result of which must be a serious injury to Kiranbhai on his cheek. Therefore, the evidence of prosecution is doubtful and witnesses are not telling the whole truth. Drawing the attention of this Court on P.M. Note and the evidence of Dr. Uday, particularly, with regard to the time of incident, it was contended that the deceased Rajendra died at 1.45pm on 6.10.1992. Post Mortem of the dead body began at 10.00Am on 6.10.1992 and Doctor found rigor mortis on over all body. Dr. Uday

Exh. 28 also supported his version given in the Postmortem Note that rigor mortis was present on over all body and he further stated that the doctor opined that rigor mortis all over the body takes 12 hours and it continues on the dead body for further period of 12 hrs. and disappear after the 24 hours of the death. According to the opinion of the doctor, rigor mortis was in second stage, then submission is that the incident must have been taken place near about 10.00 PM on 5.10.1992 and the witnesses of the occurrence are not telling truth and they must not be believed in view of this contradiction between the medical as well as ocular evidence. Further it is stated that according to the Postmortem Note Ex.29, the dead body contained semi solid food in stomach at the time of post mortem. Attention of the court was again drawn to the evidence of complainant Kiranbhai at Exh. 18, wherein in his cross-examination, he stated that the deceased took supper at 7.30 PM, therefore, the submission is, had the complainant told the truth before the court, the Doctor would not have found semi solid food in stomach. The evidence of the eye witnesses therefore according to the learned Advocate becomes doubtful. The third contention in this respect is regarding the nature of injuries which the deceased received. Muddamal Article No.9 Sword, according to the submission, is having one edged sharp and the other blunt. If the injuries which is attributed to the accused Dinesh, if had been caused by sword muddamal article no. 9, then there could not be an injury having sharp cut on both the sides as described in Postmortem Note, Injury No.1. In those circumstances, according to the submissions, the injury would be of sharp cut on one side and irregular on the other side. To help the prosecution, according to the vehement submission of learned Advocate for the appellants, an attempt was made by Doctor to explain each irregularity and doubt. It was submitted that it is not always that Doctor are the witnesses of truth. They are like ordinary witnesses. A reliance is sought to be placed on a decision of the Supreme Court in the matter of MAYUR PANABHAI SHAH vs. STATE OF GUJARAT, as reported in AIR 1983 SC 66. It is, therefore, submitted that the prosecution case becomes doubtful. The next submission was in respect of the corroboration of independent witnesses. Two relatives, examined by the prosecution as eye-witnesses. Both the eye witnesses Kiranbhai Exh. 18 and Ghanshyambhai Exh. 38 are real brothers of the deceased. It was submitted that therefore, one Bhanubhai, according to the prosecution case, present at the scenario and rickshawala Ramesh Darji though available are not examined by the prosecution though according to the investigating

officer, their statements were recorded. The prosecution case as per the submission becomes doubtful and weak on account of non-examination of independent witnesses. It is also submitted that dropping of such witnesses were vehemently objected during the trial by the defence side and, therefore, an adverse inference is required to be drawn against the prosecution. Reliance is also sought by learned counsel from some decisions. It is also stated that on probability the case of the prosecution is not believable because if as per the eye-witnesses, a sword blow would have given by accused Ramesh on complainant Kiranbhai with force, then there would not be a simple injury which complainant Kiranbhai received on his finger, and therefore, the theory which unfolded by the prosecution witness Exh.18 Kiranbhai that he resisted to forceful blow of sword at the hand of accused Ramesh cannot be believed on probability. The last submission which was made in respect of non-explanation of injury on the body of accused Ramesh Chhagan (deceased accused) while he was arrested by the police on 6.10.1992 at 14.30 hrs., panchanama Exh. 33 reveals that while on the said date and time, accused Ramesh was arrested by the police, he has bandage on his forehead and swelling on left wrist. This fact and the submission is also supported by the complainant that while he saw accused Ramesh in police station, he had bandage on his forehead. Like wise, accused - Dinesh was arrested by the police on 7.10.1992 at 7.45 hrs. and when he was arrested, it was found that there was an injury on left index finger of Dinesh and a bandage was applied to his finger. Basing this fact and taking a part of the deposition of Investigating Officer wherein Investigating Officer stated that the accused had lodged a complaint, it was vehemently suggested that there was a fight between the two groups, wherein cross-complaint was also filed and due to non-explanation of the injuries on the body of the accused, the prosecution case fails because prosecution witnesses did not unfold true version of the incident and, according to the learned Advocate, the prosecution failed to prove the case beyond reasonable doubt, therefore, the judgment and order of conviction is required to be reversed. Mr. Soni has also submitted written submissions which were also considered.

21. Learned Senior Advocate Mr. Ananadjiwala on behalf of the appellant-accused Mahendra @ Bhupendra in Criminal Appeal No.938/95 was heard and he also submitted written submissions which were also taken into consideration. Learned. advocate Mr.. Anandjiwala submitted that so far as this accused is concerned, he is relative of other two accused but personally he was not

at all concerned with the deceased or accused persons or had no enmity with any of the accused. Earlier incidents took place between the parties, but the present appellant Mahendra was never party of those incidents. He also stressed on the aspect of conflicting medical evidence as submitted by learned Advocate Mr. Soni. It is further submitted that the alleged stick blow given by this accused on left cheek of Kiran Exh. 18 is not supported by medical evidence and, therefore, overt act which is attributed to this accused is not corroborated by independent evidence or the medical evidence. In complaint, name of this appellant was not disclosed and he was only described as maternal uncle's son of the accused. It was submitted that there are many maternal uncle's sons of the accused and no test identification parade was held by the Investigation Officer. Name of this accused was brought by the Investigating Officer only recording further statement of complainant Kiran. Incident occurred during the dark hours of night. Mahendra was not residing in a particular area, and therefore, on all probability, this accused Mahendra was planted accused by the prosecution witnesses. He also submitted about filing of the cross-complaint by the accused side and non-explanation of the injury received by the accused. In any case, it was submitted that though the prosecution case is not believable, the overt act attributed to this accused Mahendra by a stick blow on a cheek of Kiran is not corroborated by any other evidence. Except this, there is no incriminating circumstances found on record connecting the present appellant with the crime, therefore, the present appellant Mahendra is required to be acquitted.

22. Supporting the judgment and order of conviction in question, learned APP Mr. Prachhak also made oral submission as well as submitted written submissions. According to the learned APP the culpable homicide is proved by the evidence of Doctor and PM and blow of sword was given by the accused is amply proved by the eye witnesses. It was also submitted that there is nothing on record to disbelieve the version of two eye witnesses though they are real brothers of deceased. It was submitted that it is not the rule of law that the evidence of relatives should be thrown out only on that count. It is proved that the accused persons in furtherance of common intention to cause injury to the vital parts of the body of the deceased, have inflicted blows with sword. The prosecution was able to adduce sufficient evidence and to prove the charge against the accused persons. According to the learned APP, in over all facts and circumstances of the case, the learned

Sessions Judge rightly came to the conclusion that all the appellants were guilty for committing murder of deceased Rajendra and were also liable to be convicted under Section 34 of IPC. It was, therefore, submitted that the Appeals be dismissed.

23. Having heard both the learned counsel for the appellants and learned Addl. Public Prosecutor, we have taken threadbare exercise to appreciate the evidence on record from each corner of the evidence available. The evidence on record, especially the evidence of two eye witnesses, namely, PW-1 Kiran Jayantilal Exh.18 and PW-8 Ghanshyam Jayantilal, Exh. 38, along with the evidence of medical expert and other corroborating evidence was dispassionately scrutinized. While undertaking such scrutiny, the set up and the environment in which the crime is committed, the level of understanding of the witnesses, the overzealousness of the witnesses who are near relations of the deceased to ensure that the possibility even remotely connected in favour of the accused is crushed, the way of narration of the fact by the above said witnesses and the demeanour of the witnesses which convinced the trial court as the creditworthy, unhesitantly lead us to conclude that the case of the prosecution resting mainly on these two eye witnesses is creditworthy and cannot be thrown overboard for the alleged infirmities in prosecution case pointed out by learned counsel of the appellants in both the appeals. It is not the quantity of the witnesses but the quality, even of sole eye witness proves prosecution case. Even if the complicity of the accused is proved by credible evidence of one or two eye witnesses, be they related to the deceased, it would not at all be unsafe to convict the accused on such an evidence when judicial conscious resolves positive findings as to the credibility of such witnesses. It is also to be noted that the evidence of the eye witnesses especially in murder cases are required to be appreciated on realistic approach and not by imaginary or flimsy reasoning. Power of a witness to grasp the real incidents occurring before his eyes, the power of retention by his memory, the power to express before the court of law in a bit pompous atmosphere also should not lost sight of when evidence is appreciated. A witness may not stand the test of cross-examination, which may be sometimes, because he is guided by his mental capacity and is not able to understand the question put to him by the skilful cross-examiner and at times under stress of cross-examination, certain answers are snatched from him. The evidence therefore in such circumstances has to be shifted with all care. One would hardly come across the

witness whose evidence does not contain a grain of untrue or any rate exaggeration or embellishment and, therefore, a dictum is evolved by judicial pronouncements that attempt always is required to be made to separate the grains from the chaff, the truth from falsehood.

24. We have anxiously and carefully gone through the evidence of the above said two eye witnesses and rest of the evidence of the prosecution supporting the evidence of the eye witnesses. There is no earthly reason to disbelieve the version given by these two eye witnesses which is more supported by rest of the evidence. There cannot be a prosecution case with cast iron perfection in all respects, but on careful dispassionate scrutiny undertaken by us, clearly reveals the ring of truth in the say of the above two witnesses. Both the witnesses have stated very distinctly and in natural manner the substratum of the prosecution case which defence is not able to shake at all. The vital features stated by these two witnesses about the incident on complete and comprehensive appreciation, as above said, leaves no doubt or any air of suspicion about the occurrence of the incident as narrated by the above said witnesses leading the prosecution case to have been proved beyond reasonable doubt.

25. Both the above said eye witnesses PW-1 Kiran Jayantilal, PW-8 Ghanshyam Jayantilal, no doubt are real brothers of the deceased, but when factual scenario is weighed with the realistic approach of life, we found that the presence of these two witnesses at their house situated near the place of incident is natural. Even for a moment, one cannot imagine that PW-1 and PW-8 could not be present at the residence when the incident took place. This attending circumstance lends credence to the testimony of these two witnesses. Not only that PW-1 Kiran Jayantilal is an injured witness, much is said about his minor and simple injury which he received on his finger on the ground that a sword blow inflicted by the accused Ramesh (since deceased) on complainant PW-1 would not have resulted in this simple injury, but when scuffle starts, when persons are out of their mind, it is very difficult to imagine that how the accused as well as the victims might have reacted in the given circumstance. The arguments advanced by the defence side that the simple injury which PW-1 Kiran Jayantilal received was self-inflicted and had the deceased accused given sword blow, then the injuries would have been serious, cannot be accepted for the above said simple reason and we are unable to agree with the learned counsels of the appellants that PW-1 Kiran Jayantilal was not present at

the place of incident. On the contrary, we positively find that a blow which was attempted to be inflicted by deceased accused on PW-1 Jayantilal, due to movements of both the accused and victims, as was found by the Medical Officer, landed on the finger of complainant- PW1. Had the intention on the part of PW-1 and PW-2 to manipulate injuries, then it is difficult to believe that PW-1 would manipulate such simple injury, which can easily be branded as self-inflicted. Had it been manipulation, then nothing prevented PW-1 from manipulating such injuries to his brother PW-8 Ghanshyam Jayantilal. We do not find any such attempt on the part of these witnesses. Therefore, PW-1 Kiran Jayantilal is a witness, who is though related to the deceased, is a prosecution witness, who has received injury in the incident in question. The evidence of an injured witness has its own efficacy and relevancy. Firstly, the injury establishes the presence of such witnesses at the scene of offence, more particularly, when the incident has taken place near the residence of PW-1 and PW-8 and their presence at the relevant hours at their residence was natural and, therefore, PW-1 is not only an injured witness but PW-1 and PW-8 are natural witnesses, whose presence at the spot cannot be doubted in any manner and further PW-1 being injured witness, unless there are cogent reasons, such evidence cannot be thrown over board branding such truthful witness to be a liar. Moreover, the witnesses of the occurrence on strict scrutiny have earned credibility of the simplicity and naturalness of their testimony which undoubtedly emanates from truthfulness. Taking therefore overall view we are unable to accept the contention of the appellants side that PW-1 and PW-8 being near relatives of the deceased should not be believed. On the contrary, both the witnesses lend assurance to credibility, and there was no possibility at all that these two witnesses would have roped the present appellants in this serious crime and would allow the real culprits go scot-free. The reasons advanced on appellants side to disbelieve the prosecution evidence is dealt with as under one by one.

26. The first vehement contention from both the learned counsels took us to the contradictions in the testimony of PW-1 and PW-8. In this respect, the evidence of Investigating Officer PW-12 Exh. 56 Jensinh Atusinh Thakor is reliable. Contradiction in the evidence of PW-1 Kiran Jayantilal is sought to be proved in paras, 33, 34 35, 36 and 37 of the deposition. When we go through these contradictions, it is clear that these contradictions are nothing but minor discrepancies. The contradiction regarding whether wife of the deceased

Rajendrabhai Jayantibhai was accompanying the deceased is immaterial because it is not the prosecution case that the wife of deceased Rajendrabhai was accompanying the deceased when the incident occurred. The next contradiction is regarding whether PW-8 Ghanshyam Jayantilal came along with PW-1 from the house towards the place of incident. The third allegation is regarding the statement of PW-1 in the complaint about whether accused Bhailalbhai instigated other accused by saying that kill all of them whether before or after the incident. The next contradiction is in regard to the abuses given by all the accused to the complainant when witness Bhanubhai reached at the scene of offence. Likewise, in the evidence of PW-8 Ghanshyambhai, he was contradicted with this police statement, stated that accused Bhailalbhai instigated the other accused. In his deposition, PW-8 Ghanshyambhai stated that accused Dineshbhai thrusted the sword in the left chest of his brother Rajendrabhai while in his statement before the Police he stated to the extent only to the infliction of blow on chest omitting "left". Now the question is whether these minor discrepancies would lead to the conclusion that due to such discrepancies, the case of the prosecution has become inferior and so unbelievable that the prosecution case would not be reasonably probable and that the witness of occurrence were liar!

27. In this respect, it must be noted that minor inconsistencies in the evidence of the witnesses cannot be a ground for discarding his evidence which otherwise is acceptable as competent and truthful. Minor discrepancies in the evidence of the witnesses on the contrary lend assurance to the credibility of the prosecution case. The minor discrepancies on trivial matters without affecting the core of prosecution case would not prompt the court to reject the evidence in its entirety if the general tenor of the evidence given by the witness and the trial court upon appreciation of evidence forms opinion about the credibility thereof. In the normal circumstances such an opinion must not be controverted without justifiable reasons. Ultimately, it is the totality of the circumstances, which is required to be taken into consideration. Once the trustworthiness of the evidence stated in the case stands satisfied, the court must not hesitate in accepting the same. There would hardly be a witness whose evidence does not contain some amount of exaggeration or embellishment but such discrepancy must not weaken the case of prosecution. Only the contradiction, which affect the core of the prosecution case are material contradictions and capable of affecting the prosecution case. In the present case,

the evidence on record discloses the core of prosecution case to be an assault by four accused on Rajendrabhai and witnesses PW-1 and PW-8 in which accused Dineshbhai inflicted a sword blow on left side of the chest of Rajendrabhai causing his instantaneous death. It is core of prosecution case that the incident took place near the house of PW-1 and PW-8 and only hearing shouts and commotion outside on road, when PW-1 and PW-8 came out, they noticed the incident. Now, the core of prosecution case is not at all affected by the contradiction as alleged on behalf of the appellants. On the contrary, the evidence on record however, lends credence to the credibility of the witness because parrot like statements are disfavoured by the courts. In the present case, as above said, the discrepancies pointed out were minor and cannot be construed to be contradictions to the core of the prosecution case. Any of the discrepancies pointed out or all of them even if taken cumulatively is not fatal to the prosecution case because they are mere minor variance in the evidence, which would lend credence to the prosecution case. We, therefore, do not find any such contradiction in the prosecution case as advanced by the learned counsel for the appellants as to conclude that those discrepancies were fatal to the prosecution case.

28. Both the learned counsel in both the appeals have vehemently urged that from the scene of offence, the deceased was shifted and was placed in a rickshaw. According to the evidence of PW-1, PW-1 himself along with his brother Ghanshyambhai and with the help of Bhanubhai, put the deceased in rickshaw. The wound which the deceased received was oozing with blood. It was vehemently therefore contended that had these witnesses of the incident were truthful then their clothes must have found blood stained. It was contended that witnesses have specifically stated their clothes were not blood stained. It was contended that this improbability would be fatal to the prosecution case. This contention raised by learned counsel is difficult to be accepted because there may be so many contigencies and probabilities whereby the clothes of PW-1 and PW-8 did not become blood stained. Firstly, the oozing of the blood after some time of the incident might not be so sprinkling as to cause stains on the clothes of PW-1 or PW-8 or witness Bhanubhai and secondly the witnesses might have handled the deceased so as not to cause stains on their clothes. On this count, the case of prosecution cannot be doubted. In similar circumstances in the matter of BABOOLAL vs. STATE OF UP, reported in (2000) 10 SCC 388, the Supreme Court observed in Para-9 as

under:

"9. Learned counsel next contended that if the injured person had been carried in a rickshaw as stated by the witnesses, the clothes of the carrier would have been soaked in blood. We do agree that there is such a possibility. Want of evidence that the clothes of those persons contained blood does not mean that the injured would not have been carried from the place of occurrence to the hospital. That may be a lapse of the investigating officer to bring it to the Court. But that lapse is not sufficient to offset the credibility of the testimony of the eyewitnesses among whom included the injured Akbar Shah (PW-2)."

29. The next contention which was forcefully advanced in respect of non-examination of independent witnesses for corroborating the evidence of interested, related eye witnesses. Main thrust was advanced upon dropping the witness Bhanubhai by the prosecution, though Bhanubhai was an independent witness. It was urged that by Exh. 55 purshis, the prosecution declared before the Trial Court that witness Bhanubhai was won over and therefore he was dropped. This purshis was objected by the learned Advocate for the accused in the Trial Court. Learned Counsel for the appellants stated some case law in this respect that when prosecution drops material witness an adverse inference be drawn against the prosecution. In this respect if we take the case in its true perspective, the point in issue is whether the evidence on record is sufficient to prove the case of prosecution or the evidence is deficient and requires further corroboration. The proposition that the dropping of the material witness by the prosecution results into drawing of an adverse inference against the prosecution can be considered in the above said background only. If a material witness who would unveil genies of the incident or vital part of the prosecution case is dropped for the convenience of the prosecution, or where there the gap or infirmity in a prosecution case which could be filled up by the witness which is sought to be dropped, the question arises as to whether an adverse inference should be drawn against the prosecution or not. In such circumstances, the prosecution case can be termed as suffering from deficiency and withholding of such material witness and would oblige the court to draw an adverse inference against the prosecution by holding that if the witness would have been examined it would not have supported the prosecution case. The other side of the coin is, when there is overwhelming evidence adduced by the prosecution

side, and when examination of witnesses from the public or other witnesses would be a duplication and repetition to the evidence already adduced, non-examination of such witnesses would never be material. The duty of the court therefore is to scrutinise the worth of the evidence adduced and come to the conclusion that in the given facts and circumstances of the case, was it whether necessary to examine such other witnesses as complained of by the defence. If the witnesses already examined are reliable and trustworthy and their testimony is unimpeachable, the court can safely act upon it uninfluenced by the factum of non-examination of other witnesses. The question therefore for drawing the adverse inference against dropping the witness would arise only when the evidence adduced by the prosecution is deficient and the prosecution requires to fill up the gap to prove its case and hence non-examination of a material witness is not a mathematical formula for discarding weight of testimony available on record, howsoever, natural, trustworthy and convincing, it may be. When non-examination of witness Bhanubhai would not water-down the finding arrived at by overwhelming evidence of two eye witnesses found reliable, non-examination of Bhanubhai can never affect the prosecution case adversely.

30. In the present case, there is overwhelming evidence of PW-1 and PW-8 and there is sufficient corroborating evidence of recovery of weapons, etc to lend credence to the testimony of these witnesses and therefore non-examination of witness Bhanubhai or any other witness of the incident is not at all important or vital to the prosecution case. We have assessed the trustworthiness of the evidence adduced and available on record. We have found that the evidence adduced worthy of being relied on. We are inclined to accept and act upon the evidence available and, therefore, the question of examination of other available witnesses of scene of offence pales into insignificance. The contention raised therefore is negatived.

31. The next contention which was vehemently urged among other contentions that there was injury on the body of the accused Dineshbhai and deceased accused Rameshbhai when they were arrested by the Police in this crime. It was urged that in the evidence of PW-8 it was admitted by him that he has seen the accused Ramesh in the police station with a bandage on his head. It was contended that accused Ramesh was arrested by the Police on 6.10.1992 at 14.30 hours vide panchnama Exh. 33. The said panchnama Exh. 33 denotes that there was a bandage

on the head of the accused Rameshbhai (since deceased). Like wise, accused appellant Dineshbhai was arrested by the Police on 7.10.92 at 7.45 hours and it was found that he had also applied a bandage on his finger. Therefore, it was contended that these injuries are not explained by the prosecution and the witnesses posing them as eye witnesses are not the witnesses of the incident. Along with this contention, it was also argued that in fact there was cross case, in which accused deceased Rameshbhai and accused appellant Dineshbhai both were injured. The prosecution, according to the contention, is not coming with the clean hands and, therefore, it is the case of self-defence and the accused appellants are entitled to acquittal. The contention is placed alternatively that, firstly, on non-explanation of injuries on the accused, the prosecution case fails and that secondly the incident occurred in a scuffle, in which the accused acted in self-defence and are entitled to acquittal. When we appreciated this contention of learned counsel for the appellants, on the scrutiny, we found nothing on the record to even remotely suggest that the accused deceased Rameshbhai and accused appellant Dineshbhai received injuries in the incident, which is the subject matter of this prosecution. True it is, that in cross-examination of PW-1 suggestion is placed by the defence that there was scuffles between both the parties and on account of which, the deceased had received injuries while getting down from the roof of a house. It is true that the Investigating Officer Jensinh Atusinh Thakor, PW-12 Exh. 56, has stated in his deposition that he had recorded the complaint of accused deceased Ramesh, but we are unable to find anything that the said complaint was in regard to the very incident which is subject matter of this prosecution. Mere suggestion to the witness are insignificant. Had it been cross complaint recorded in the same incident, nothing prevented the defence from producing the certified copy of the same which has not found the place on record nor any of the accused took the said stand or defence in their examination under Section 313 of the Criminal Procedure Code. Their case of defence was of total denial before the Trial Court. There is nothing on the record to even remotely indicating that the cross complaint was filed in respect of the same incident or that no such defence was taken except mere suggestions before the Trial Court, it is very difficult to come to the conclusion that the accused received injuries in the same incident. It clearly appears that the accused adopted touch and go method and played hide-and-seek. The defence did not come out boldly with the case that there was scuffle between the parties and in which the

cross complaint was filed and both the accused were injured. No such defence was taken by the accused as abovesaid in their examination under Section 313 of the Criminal Procedure Code, and this results into a situation where such possibility or a probability that the accused received injuries in self-defence has to be discarded. Therefore, unless it is established that the injuries sustained by the accused was sustained by them in the same incident in which persons belonging to the prosecution side suffered injuries, the duty cannot be cast upon the prosecution to explain the injuries found on the body of the accused. The alternative contentions raised on the ground of non-explanation of injuries to the accused and that the plea of self-defence both in the facts and circumstances of this case, as aforesaid, would not cause any dent to the prosecution case.

32. The last submission which was vehemently urged before us was in respect of conflict between the medical evidence and the ocular evidence. This contention was based on three facts. Firstly, the PW-5 i.e. Dr.Uday Sureshchandra Shah, Medical Officer of Dakor Community Health Center, opined that when he undertook the postmortem examination of the deceased at about 9.30 hours on 6.10.1992, rigor mortis was set in whole of the dead body of the deceased. In cross-examination, he also stated that the rigor mortis on the dead body was on second stage, therefore, on this count it was urged that since rigor mortis ordinarily sets in upon the dead body after 12 hours of the death and remains in body for next 12 hours, the death of deceased might have been caused at about 22.00 hours on 5.10.1992 and not as stated by the witnesses on 6.10.1992 at 1.15 hours. The second contention was in respect of nature of injuries where the Doctor found the injury No.1 of Postmortem Note Col. No. 17 on the dead body of the deceased Rajendrabhai to be sharp on both the sides. Now, the contention is admittedly one edge of the sword, Mudamal Article No.9 by which it is alleged that the injury was caused to Rajendra is sharp while the other edge is blunt. The said witness Dr. Udai Sureshchandra Shah in his cross-examination admitted that if the weapon used which contains one sharp edge and the other blunt edge, then the margin of the injury would be sharp on one side while irregular on the other. Therefore, it is contended that the injury No.1 caused to Rajendra on left side of the chest could not have been caused by muddamal article No.9 as per the prosecution case and the ocular evidence is in conflicting with the medical evidence. The third aspect which was raised was in respect of the state of stomach found by the Doctor in postmortem. PW-1 Kiran Jayantilal

in his deposition in para-41 deposed that the deceased took his food at 19:30 hours, the incident occurred on 6.10.92 at 1.15 hours and when Doctor undertook the postmortem examination, he found stomach with semi digested food and hence it is contended that if he had taken food at 19:30 hours on earlier day, the Doctor could not have found semi digested food in the stomach at 9.30 hours on 6.12.1992 because the food ordinarily is digested within 6 to 7 hours. Basing the contention on above three aspects it was stated that there was unresolved conflict between the medical evidence and ocular evidence and therefore the prosecution case becomes doubtful. Some case law in this respect was also cited.

33. To appreciate the above said contention, it is noteworthy that though PW-1 stated in his deposition at para 41 that deceased Rajendrabhai took his food at 19.30 hours on earlier day, but there is no positive evidence on record that deceased Rajendra had not taken the food thereafter and, therefore, this contention is required to be negatived for this simple reason. So far as the conflict between the medical evidence and ocular evidence is concerned, firstly the court should assess whether there is any such conflict. True it is that as contended by learned counsel Mr. Yatin Soni that Doctors are not the witnesses of the truth but they are ordinary witnesses and their evidence is required to be appreciated as such. But it is a settled principle that the opinion of Doctor or medical expert cannot overrule the ocular evidence. In this case, in fact there is no unresolved conflict between the ocular evidence and the medical evidence. Sometimes, it may happen that while causing wound, the margin of the injury may appear to be sharp to a Doctor who noticed the nature of injuries by his own perspective. Setting of the rigor mortis always depends upon the environment and so many other factors. Even if we take that both the margin of the injuries were sharp and that the rigor mortis was in second stage, there is no such conflict as has been attempted to be raised because there is always possibility of error of judgment on the part of Doctor. Therefore, no undue primacy should be given to medical witnesses to exclude eye witnesses, which is to be decided independently and not treated as "variable" keeping the medical evidence as the "constant". Merely because the position of the injury is slightly different, the trustworthy of the testimony of oral evidence cannot be discarded nor can it be said that the medical evidence is contrary to the oral evidence. In case of SHAMSHER SINGH ALIAS SHERA vs. STATE OF HARYANA, reported in (2002) 7 SCC 536, in

similar circumstances, the Apex Court was pleased to observe in para 8 as under :

> "8. The authorities cited by the learned counsel for the appellant, on the point that when there is conflict between the medical evidence and the ocular evidence, the prosecution case should not be accepted, are of no help to him in this case. On deeper scrutiny of the evidence as a whole, it is not possible to throw the prosecution case as either false or unreliable on the mere statement of the doctor that injuries found on the deceased could not be caused by a sharp-edged weapon. This statement cannot be taken in isolation and without reference to the other statement of the doctor that the injuries could be caused by Exh. P.29 axe to disbelieve the evidence of the eyewitnesses. From the evidence available in this case the possibility of the blunt head of the axe or the stick portion coming in contact with the head of the deceased cannot be ruled out. These decisions cited by the learned counsel for the appellant are related to those cases where the medical evidence and the version of the eye witnesses could not be reconciled or that the account given by the eyewitnesses as to the incident was highly or patently improbable and totally inconsistent with the medical evidence having regard to the facts of those cases and as such their evidence could not be believed. The case on hand is not one such case."

In this view of the matter we do not find any merit in the contention that the prosecution case is weakened and not believable on account of conflict between the medical evidence and ocular evidence.

34. From the above scrutiny, we come to the conclusion that both the eye witnesses PW1 and PW-8 are trustworthy, truthful and unimpeachable so far as the occurrence of the incident is concerned. The testimony is corroborated by other evidence of the prosecution i.e. by medical expert, panchnama of discovery and the evidence of the Investigating Agency. We do not find any reason not to act upon the testimony of PW-1 and PW-8 to prove the case of the prosecution. The prosecution has proved its case beyond reasonable doubt so far as the occurrence of the incident is concerned and the so called infirmities pointed out by the defence i.e. appellants in both the appeals are meritless. Therefore, we come to

the conclusion that appellant Dineshbhai inflicted a sword blow on deceased Rajendra with intention to cause murder and he has been rightly convicted by the Trial Judge under Section 302 of the IPC.

35. However, we shall have to decide now whether other two appellants i.e. Mahendra @ Bhupendra Punambhai i.e. appellant of Criminal Appeal No.938/95 original accused No.3 and Bhailabhai Chagganbhai Bhoi appellant No.2 in Criminal Appeal No.1011 of 95 - original accused No.2 are responsible for causing murder of deceased Rajendrabhai with the aid of Section 34 of the Indian Penal Code. The Trial Court with the aid of Section 34 of the IPC came to the conclusion that accused Mahendra Bhupendra Punambhai and Bhailalbhai Chhaganbhai both had common intention with accused Dineshbhai to cause murder of deceased Rajendra and therefore they were found guilty and convicted for the charges levelled against them under Section 302 of the IPC to read with Section 34 of the IPC. The alternative argument of both the learned counsels in this respect is, there is not even remote reason to come to the conclusion that accused Mahendrabhai and accused Bhailalbhai both shared the common intention with the accused Dinesh, who inflicted sword blow. It was stated that accused Bhailal did not participate in the incident except it was alleged that he was instigating the other accused with oral exhortation to kill the complainant and others. It was contended that this instigation was before inflicting the injury to the deceased Rajendra or thereafter is also a doubtful fact. While so far as accused Mahendrabhai @ Bhupendra Punambhai is concerned he is alleged to have given a lathi blow on the left side cheek of PW-1 Kiran Jayantilal which is not supported by the medical evidence. It was contended that from the above facts, it cannot be said that both the accused i.e. Mahendrabhai Bhupendra Punambhai or Bhailalbhai Chhaganbhai shared the common intention though at the most Bhailalbhai can be convicted for some lesser offence while Mahendrabhai can be convicted at the most for the offence under Section 323 of the IPC.

36. To consider properly, the contention raised, it must be noted that when more than one persons involved themselves in the same incident, it is to be assessed from the facts and circumstances of the case that what was the intention of the said persons. In other words to apply Section 34 of the IPC, two factors must be established by the prosecution i.e. (i) common intention and (ii) participation of the accused in a commission of an offence. True it is that if a common intention is

proved but no participation is attributed to the individual accused, Section 34 of the IPC will be attracted as essential of which involves vicarious liabilities. Likewise, if the participation of the accused in the crime is proved and a common intention is not proved, then Section 34 cannot be invoked. In such circumstances, the complex act attributed to the accused persons at the scene of offence must be facilitating or promoting the offence, the commission of which would be involvement of such accused in a joint criminal venture. The vital aspect of Section 34 is "simultaneous consensus of the minds" of the persons participating in the criminal action to bring about a particular result. The existence of such intention can be inferred from the attending circumstances of the case and from the conduct of the accused. Therefore, it is necessary to assess the proven facts of the case.

37. It is proved by the prosecution that accused No.2 Bhailalbhai and accused No.3 Mahendrabhai were present along with other two accused at the scene of offence when accused Dineshbhai inflicted a blow of sword by pushing sword in the chest of deceased Rajendra. If we carefully scrutinize the evidence on record and proven facts, it is nowhere found that accused Bhailalbhai or accused Mahendrabhai had shared common intention with accused No.1 Dinesh Chhaganbhai Bhoi to kill Rajendra when he inflicted a sword blow on left chest of deceased Rajendra. This can be inferred from the above act attributed to both these accused Bhailalbhai and Mahendrabhai. It is stated by PW-1 that Bhailalbhai was instigating by saying that kill them all while accused Mahendrabhai inflicted a blow by lathi which landed on the cheek of PW-1. To this extent, the prosecution case is proved. To find out whether accused Mahendrabhai and Bhailalbhai both had common design in mind and consensus, the evidence on record as to attending circumstances, conduct of the accused, circumstances preceding and succeeding the incident, will have to be taken into consideration and will have to be carefully scanned. Both the eye witnesses i.e. PW-1 and PW-8 reached at the scene of offence when the incident either had already started or was about to be started. There is no evidence of prosecution on record that all the four accused came together and accosted the deceased Rajendra. What Bhailalbhai early stated was only his opinion, revealing his state of mind to the extent that he uttered that to kill all of them. This fact itself unless it is supported and corroborated by some other evidence, would not lead to establish that the accused Bhailal had also shared the intention to kill Rajendra along with accused

Dineshbhai Chagganbhai Bhoi. These were simple oral exhortations and those cannot form the basis of the common intention nor the overt act attributed to accused Mahendrabhai also, can be termed as an act in furtherance of common design as consensus in the minds of all the accused more particularly there was no previous enmity between accused Mahendrabhai and complainant party nor he was involved anywhere in earlier litigation. The circumstances immediately preceding the incident are not brought on record by prosecution because witnesses PW-1 and PW-8 reached at the spot when the incident was about to be started or on the verge of starting, so the behaviour of the accused, preceding the incident is not available through the evidence and while during incident only aforesaid overt act are attributed on accused Bhailal as well as accused Mahendra. Oral exhortation cannot be termed as sharing of common intention. In the matter of PARSHURAM SINGH vs. STATE OF BIHAR, reported in (2002) 8 SCC 16, in paras 5, 6 and 7, the Hon'ble Supreme Court observed as under :

"5. Nonetheless, we have to evaluate the role played by A-1 Rameshwar Singh and A-4 Parshuram Singh in order to ascertain whether they would have entertained a common intention to murder the deceased. Neither of them had inflicted any injury on the deceased. A-1 Rameshwar Singh had a lathi with him and in spite of that he did not choose to given even a minor assault on the deceased. All that is said against him is that he ordered the killing of the deceased. It is not shown that A-1 had any particular reason for taking up the leadership of the gang. On the other hand the genesis of the quarrel was the dispute regarding the timber tree which stood on the boundary of the lands belonging to A-3 on the one side and the deceased on the other. For convicting a person merely on the basis of the oral statement made at the spot, the Court must have other surrounding circumstances to ensure the confidence that he made such an exhortation. If A-1 had really any intention to participate in the occurrence, much less any common intention to murder the deceased, it is difficult for us to conceive as to why he did not use the weapon which was handy with him then.

6. The role attributed to A-4 Parshuram Singh is that he had a pistol with him and he threatened the other persons who reached the scene. Here also, if A-4 Parshuram Singh had the

common intention to murder the deceased, it is highly improbable that he would have refrained from using an inherently lethal weapon like the pistol which was in his possession. He would have threatened others from coming into the fray perhaps as a measure adopted by him to save them from receiving injuries.

7. For the aforesaid reasons we have difficulty to confirm the finding that A-1 Rameshwar Singh and A-4 Parmeshwar Singh really entertained common intention with the other assailants to murder the deceased. The benefit of reasonable doubt emanating from the broad features of the case must be extended to those two accused."

38. It is noteworthy that accused Bhailal had a lathi with him, even then he satisfies himself by oral exhortation. Had there been any common intention on the part of Bhailal, then it is difficult to conceive that when he had all the opportunity to do so, he did not make any attempt to inflict lathi blow. While if accused Mahendra had common intention to kill, then he would not also have satisfied with simple lathi blow which even failed to cause only abrasions. The Apex Court mandated again guidelines in respect of Section 34 of the IPC in the matter of SURESH AND ANOTHER VS. STATE OF U.P. WITH STATE OF UP vs. PAVITRI DEVI, reported in AIR 2001 SC 1344, in paras 22, 23, 39 and 53, the Apex Court observed as under :

"22. Thus to attract Section 34, IPC two postulates are indispensable. (1) The criminal act (consisting of a series of acts) should have been done, not by one person, but more than one person. (2) Doing of every such individual act cumulatively resulting in the commission of criminal offence should have been in furtherance of the common intention of all such persons.

23. Looking at the first postulate pointed out above, the accused who is to be fastened with liability on the strength of Section 34, IPC should have done some act which has nexus with the offence. Such act need not be very substantial, it is enough that the act is only for guarding the scene for facilitating the crime. The act need not necessarily be overt, even if it is only a covert act it is enough, provided such a covert act is proved to have been

done by the co-accused in furtherance of the common intention. Even an omission can, in certain circumstances, amount to an act. This is the purport of Section 32, IPC. So, the act mentioned in Section 34, IPC need not be an overt act, even an illegal omission to do a certain act in a certain situation can amount to an act, e.g. a co-accused, standing near the victim face to face saw an armed assailant nearing the victim from behind with a weapon to inflict a blow. The co-accused, who could have alerted the victim to move away to escape from the onslaught deliberately refrained from doing so with the idea that the blow should fall on the victim. Such omission can also be termed as an act in a given situation. Hence an act, whether overt or covert, is indispensable to be done by a co-accused to be fastened with the liability under the section. But if no such act is done by a person, even if he has common intention with the others for the accomplishment of the crime, Section 34, IPC cannot be invoked for convicting that person. In other words, the accused who only keeps the common intention in his mind, but does not do any act at the scene, cannot be convicted with the aid of Section 34, IPC.

38. Dominant feature for attracting Section 34 of the Indian Penal Code (hereinafter referred to as "the Code") is the element of participation in absence resulting in the ultimate "criminal act." The "act" referred to in latter part of Section 34 means the ultimate criminal act with which the accused is charged of sharing the common intention. The accused is, therefore, made responsible for the ultimate criminal act done by several persons in furtherance of the common intention to all. The section does not envisage the separate act by all the accused persons for becoming responsible for the ultimate criminal act. If such an interpretation is accepted, the purpose of Section 34 shall be rendered infructuous.

39. Participation in the crime in furtherance of the common intention cannot conceive of some independent criminal act by all accused persons, besides the ultimate criminal act because for that individual act law takes care of making such accused responsible under the other provisions of the Code. The word "act" used in Section 34

denotes a series of acts as a single act. What is required under law is that the accused persons sharing the common intention must be physically present at the scene of occurrence and be shown to not have dissuaded themselves from the intended criminal act for which they shared the common intention. Culpability under Section 34 cannot be excluded by mere distance from the scene of occurrence. The presumption of constructive intention, however, has to be arrived at only when the Court can, with judicial servitude, hold that the accused must have preconceived result that ensued in furtherance of the common intention. A Division Bench of the Patna High Court in Shatrughan Patar v. Emperor, AIR 1919 Pat 111: (1919 (20) Cri LJ 289) held that it is only when a Court with some certainty hold that a particular accused must have preconceived or premeditated the result which ensued or acted in concert with others in order to bring about that result, that Section 34 may be applied.

53. After referring to Mahbub Shah's case (AIR 1945 PC 118:1945 (46) Cri. LJ 689) (supra) this Court in Mohan Singh v. State of Punjab, (AIR 1963 SC 174:(1963 (1) Cri LJ 100) observed, it is now well settled that the common intention required by Section 34 is different from the same intention or similar intention. The persons having similar intention which is not the result of pre-concerted plan cannot be held guilty for the "criminal act" with the aid of Section 34. Similarly the distinction of the words used in Section 10 of the Indian Evidence Act "in reference to their common intention" and the words used in Section 34 "in furtherance of the common intention" is significant. Whereas Section 10 of the Indian Evidence Act deals with the actions done by conspirators in reference to the common object. Section 34 of the Code deals with persons having common intention to do a criminal act."

39. From the above it is clear that neither accused Mahendrabhai @ Bhupendrabhai Punambhai Bhoi nor accused Bhailalbhai Chagganbhai Bhoi had common intention i.e. intention which accused Dinesh Chhaganbhai Bhoi was having, to commit the murder of deceased Rajendrabhai. There is no evidence on record to denote that there was any pre-concerted plan amongst the accused to kill the

deceased Rajendra because the circumstances preceding the incident are not on record. At the most, accused Bhailal Chagganbhai has committed offence under Section 506(2) of the IPC and accused Mahendra @ Bhupendra Punambhai has committed offence under Section 323 of the IPC. The trial court to that extent committed error in convicting these two accused for the charges under Section 302 of the IPC to read with Section 34 of the IPC. Therefore while rejecting the appeal against accused Dinesh Chagganbhai in toto, the appeal filed by accused Bhailalbhai and accused Mahendrabhai are required to be allowed to the above said extent only that the conviction and sentence awarded to them under Section 302 read with Section 34 of the IPC is required to be altered to Section 506 of the IPC for accused Bhailal Chagganbhai while under Section 323 for accused Mahendra @ Bhupendra.

40. In the result, Criminal Appeal No. 1011/95 filed by original accused No.1 Dineshbhai Chagganbhai Bhoi is rejected. It is placed on record by learned APP Mr. Prachhak through a letter dated 7.1.2004 addressed to learned APP by Jailor that accused - appellant Dinesh Chagganbhai Bhoi after earning remission and special remission on account of the Birth Day of the Hon'ble Prime Minister of India, has been released from jail on 25.12.2003 after serving the sentence awarded by learned Sessions Judge and hence no further orders are required to be passed in this respect, while Criminal Appeal No. 1011 of 1995 is partly allowed so far as appellant No.2 Bhailalbhai Chagganbhai Bhoi original accused No.2 is concerned, to the extent that his conviction awarded by the Trial Court under Section 302 read with Section 34 of the IPC and sentencing him for life imprisonment is quashed and set aside, instead he is convicted under Section 506(2) of the IPC and he is sentenced to the punishment which he has already undergone. Therefore, original accused No.2 Appellant No.2 in Criminal Appeal No.1011/95 Bhailalbhai Chagganbhai Bhoi is directed to be set at liberty forthwith if he is not required to be detained in jail for any other purpose. Criminal Appeal No. 938/1995 filed by appellant Mahendrabhai @ Bhupendra Punambhai Bhoi - original accused No.3 is partly allowed to the extent that his conviction awarded by the trial court under Section 302 read with Section 34 of the IPC and sentencing him for the life imprisonment is quashed and set aside and he is convicted under Section 323 of the Indian Penal Code and sentenced for the imprisonment which he has already undergone. He has undergone the actual imprisonment during trial from 6.10.1992 to 21.12.1992 and thereafter on conviction he was in jail and was released on bail by this Court vide order dated

6th of November, 1995. His bail bonds stand cancelled.

(B.J.Shethna, J.)

(J.R. Vora, J.)

p.n.nair